



INVESTIGATION REVIEW REPORT

Date: January 12, 2012

Re: Lane County Commissioners – Review of Conflict Case

Summary

This memorandum summarizes the Washington County District Attorney's Office review of a conflict matter. We have been asked to determine whether criminal prosecution is appropriate against two current and one former Lane County Commissioners for certain actions taken during 2009 related to their adoption of the County's budget.

This case was referred to the Washington County District Attorney after conflicts of interest were found to exist with the Lane County District Attorney's Office and the Oregon Department of Justice.

We have determined that criminal prosecution is not appropriate at this time, for the reasons that follow.

Background

In February 2010, a civil lawsuit was filed in Lane County Circuit Court by former Lane County Commissioner Elanor Dumdi and Eugene businessman Edward Anderson. This suit alleged that then-commissioners Bill Fleenor, Peter Sorensen, and Robert Handy violated the Oregon Public Meetings laws by illegally gathering to discuss the 2009 Lane County Budget process. Commissioner Handy's then-aide Phyllis Barkhurst had a significant role in the events in question. Ultimately, the lawsuit went to trial in Lane County Circuit Court before the Hon. Michael Gillespie. Judge Gillespie found for the plaintiffs, ruling that the Commissioners had in fact violated the public Meetings law.

One witness in the civil case was Rudy Chavarria, an administrative assistant in the Lane County Commissioner's Office. Mr. Chavarria reported that, just after the civil suit was initiated, Commissioner Fleenor directed him to an empty conference room and spoke to him in a way that suggested that Commissioner Fleenor wanted Mr. Chavarria to lie about whether the three Commissioners had ever met together at the same time. (He stated "you didn't see anything.") Mr. Chavarria has testified about this encounter twice and continues to maintain that Fleenor was apparently trying to influence his possible testimony. Lane County entered into a civil settlement with Mr. Chavarria in September 2010 with respect to claims he may have against the County.

Another issue in the case had to do with Commissioner Fleenor's personal computer. Attorneys in the civil suit, believing that the computer would contain information relevant to the case, in February 2010 filed a formal request for the preservation of documents. (Commissioner Fleenor later testified that he received this request, and that the documents in question – emails – had been on his hard drive). Later, in a September 2010 sworn deposition, Commissioner Fleenor said that an "electrical spike" had hit his computer, rendering the hard drive non-functional, but that he retained possession of the drive. Plaintiff's attorneys sent a request to inspect the hard drive, and proposed a date of Oct. 25th to do so. On October 21st, Commissioner Fleenor signed a "correction" to his earlier sworn testimony which stated that in fact he had destroyed the hard drive following the electrical spike. Commissioner Fleenor's former assistant testified that she was unaware of a hard drive malfunction.

A third issue in the civil case arose with respect to the calendar of Commissioner Handy. Zoanne Gilstrap, an aide in the Commissioners Office, testified that certain entries in Commissioner Handy's electronic calendar had been "cleaned" (deleted). These deletions were viewed as suspicious, because the items had referred to a "book club," which was believed to be a code name for the alleged illegal quorum of Commissioners meeting to discuss the budget.

Lastly, there was an issue as to whether the three Commissioners lied under oath regarding certain meetings which were alleged to have occurred. Three witnesses – Mr. Chavarria, Glendean Leak, and Melissa Zimmer, all County employees within the Commissioners' office, have given statements that indicate that the three Commissioners have at various times met together with Eugene Mayor Kitty Piercy in different Commissioners' individual offices. The Commissioners deny this.

Investigation

This case was originally promulgated by the plaintiff's attorneys in the civil suit, who believed that the crimes of Tampering with a Witness, Tampering with Evidence, Tampering with Public Records, or Perjury may have been committed. Lane County District Attorney Alex Gardner, who normally handles criminal matters occurring within Lane County, had a clear conflict of interest - the Commissioners in question oversee his office. The case was then forwarded to the Oregon Department of Justice (DOJ), who, after thorough consideration, determined that they too had a conflict of interest based on DOJ's former employment of Phyllis Barkhurst, Commissioner Handy's aide. Washington County District Attorney Bob Hermann was asked by the Department of Justice to accept the case for independent review, and he accepted.

The case itself consists of thousands of pages including deposition transcripts, trial transcripts, exhibits, documents, and reports.

Charging Determination

We have reviewed the materials submitted and carefully considered all of the criminal statutes involved. The following conclusions have been reached with respect to the particular crimes:

Tampering with a Witness: Rudy Chavarria is a credible witness who clearly establishes a troubling encounter with former Commissioner Fleenor. However, Fleenor has characterized this meeting as an honest reminder to Mr. Chavarria that he should indeed tell the

truth. Essentially, the difference lies in what the underlying “truth” is, and, as explained below, that cannot be proven beyond a reasonable doubt. This is a fairly close call, but we have determined that insufficient evidence exists to prove this crime beyond a reasonable doubt.

Tampering with Evidence: Former Commissioner Fleenor has stated under oath that his hard drive met with catastrophic failure, and was discarded. He admits that this occurred during pending litigation, with formal document-preservation steps in place. His story changed after opposing counsel asked to inspect the hard drive. His story is convenient, and frankly implausible, but in order to sustain this criminal charge we would be required to disprove his story, beyond a reasonable doubt. This could not be done. Judge Gillespie appropriately considered this (and the other items below) in his findings in the civil case.

Tampering with Public Records: Commissioner Handy apparently was never asked whether he had any part of erasing his calendar entries. Also, there was never a forensic examination done of his computer. Both of these investigative steps would have been necessary before this charge could be properly evaluated. As such, this allegation will remain as a suspicious circumstance lacking the concrete evidence to prosecute.

Perjury: Three County employees have stated, under oath, that meetings took place between the three Commissioners and Mayor Piercy. Each Commissioner, under oath, has denied that the meetings took place. This apparent credibility stalemate is resolved by Eugene Mayor Piercy who, in a recent interview, essentially corroborates the stories of the Commissioners. This, together with other issues relative to the witnesses’ time frames¹, has led us to conclude that insufficient evidence exists to prosecute.

This office has carefully weighed the considerable resources which would be necessary to prosecute such a case against the legal and factual issues discussed above, and has concluded that criminal prosecution would not be appropriate.

Questions regarding this decision should be directed to:

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¹ One witness remembers the meeting occurring in February 2009 or February 2010. Another remembers the meeting being in “May or February” of 2009, and the third witness remembers that the meeting happened, but did not begin working in the office until September 2010. In order for a lie about such a meeting to be the material basis for a Perjury prosecution, the meeting would have had to occur between April and December 2009 (when the budget process was occurring).